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No. 510

In the
Supreme Court of the United States

OCTOBER TERM, A.D. 1967.

MARVIN L. PICKERING,
Plaintiff-Appellant,

vs.

BOARD OF EDUCATION OF TOWNSHIP HIGH SCHOOL DISTRICT 205, WILL COUNTY, ILLINOIS,
Defendant-Appellee.

On Appeal From
The Supreme Court of Illinois

BRIEF OF PLAINTIFF-APPELLANT

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BRIEF OF PLAINTIFF-APPELLANT

OPINIONS BELOW

A. The Circuit Court of Will County, Illinois, rendered a written opinion which is set out in the appendix at App. I, 34.

B. The Illinois Supreme Court delivered a written opinion at 36 Ill. 2d 568, 225 N.E. 2d 1. The Illinois Supreme Court opinion is set out at App. I, 134.

JURISDICTION OF THE COURT

The jurisdiction of this Court is invoked under 28 U.S.C. 1257 (2).

Plaintiff specifically challenges *Ill. Rev. Stat.*, Ch. 122, Sec. 10-22.4 in so far as it allows dismissal of teachers for "other sufficient cause" or when in the "opinion" of the school board "the interests of the schools require it," as being constitutionally void for vagueness.

Plaintiff also challenges the statutory scheme controlling teacher dismissals in so far as it provides for a hearing before the same board of education which dismissed him (*Ill. Rev. Stat.*, Ch. 122, Sec. 24-12) and in so far as it provides that on review by a court the findings and conclusions of the board shall be considered *"prima facie"* true (*Ill. Rev. Stat.*, Ch. 110, Sec. 274).

The above statutes have remained essentially the same during the pendency of this case. Plaintiff contends that the use of these statutes by the board to effect his dismissal for writing a letter critical of school officials violated his rights of free speech under the First and Fourteenth Amendments and that the refusal to apply rules applicable in free speech cases deprived him of due process rights under the Fourteenth Amendment.

Plaintiff attacked the entire procedure during the hearing (App. I, 84). Plaintiff attacked the action of the board on review both as to First Amendment free speech rights and as to Fourteenth Amendment "due process" rights (App. I, 7, para. 1 and m).

Plaintiff maintained his position in the Supreme Court of Illinois. (See Appellant's brief there).

Plaintiff relies on *Dahnke-Walker* v. *Bondurant*, 257 U.S. 282, 425 Ct. 106 (1921) as authority for invoking the jurisdiction of this Court. That case noted:

1) the action under the state statute must be challenged as unconstitutional in the state court.

2) the state court must uphold the validity of the statute.

3) the statute need not be claimed invalid in toto.

Plaintiff believes he has met these requirements. See also *Bantam Books Inc.* v. *Sullivan,* 372 U.S. 58, 83 S. Ct. 631 (1963) and *Kingsley International Pictures Corp.* v. *Regents of the University of New York,* 360 U.S. 684, 79 S. Ct. 1362 (1959).

The Illinois Supreme Court rendered its decision on January 19, 1967 and denied plaintiff's petition for rehearing on March 27, 1967. Plaintiff filed his Notice of Appeal on June 21, 1967. The case was docketed in this Court on August 17, 1967. Probable jurisdiction was noted on November 6, 1967.

CONSTITUTIONAL PROVISIONS AND STATUTES

A. UNITED STATES CONSTITUTION

Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

B. ILLINOIS REVISED STATUTES (1963)

CHAPTER 122

Sec. 10-22.4 Dismissal of Teachers. [A board has power] to dismiss a teacher for incompetency, cruelty, negligence, immorality or other sufficient cause and to dismiss any teacher, whenever, in its opinion, he is not qualified to teach, or whenever, in its opinion, the interests of the schools require it, subject, however, to the provisions of Sections 24-10 to 24-15, inclusive. Marriage is not a cause for removal.

C. ILLINOIS REVISED STATUTES (1963)

CHAPTER 122

Sec. 24-12 (Pertinent Sections) If the dismissal or removal is for any other reasons or cause [than decrease in number of teachers is required] it shall not become effective until approved by a majority vote of all members of the board upon specific charges and after a hearing, if a hearing is requested in writing by the teacher within 10 days after the service of notice as herein provided. . . . The decision of the board as to the existence of reasons or causes for dismissal or removal shall be final unless reviewed as provided in Section 24-16 of this Act.

D. ILLINOIS REVISED STATUTES (1963)

CHAPTER 110

Section 274 Scope of Review. Every action to review any final administrative decision shall be heard and determined by the court with all convenient speed. The hearing and determination shall extend to all questions of law and of fact presented by the entire record before the court. No new or additional evidence in support of or in opposition to any finding, order, determination or decision of the administrative agency shall be heard by the court. The findings and conclusions of the administrative agency on questions of fact shall be held to be prima facie true and correct.

QUESTIONS PRESENTED FOR REVIEW

1. Does *Illinois Revised Statutes,* Chapter 122, Sec. 10-22.4 which empowers Boards of Education to dismiss teachers, place an unconstitutional limitation upon the exercise by teachers of the right of free speech as guaranteed by the First and Fourteenth Amendments to the United States Constitution?

a. Has appellant's right of free speech been infringed by the school board's dismissing him under this statute because appellant wrote and published a letter which was critical of the Board of Education and administration but which did not contain statements that were knowingly or recklessly false?

b. Does the statute provide clear and precise language which advised appellant before he wrote the letter that he would be subject to dismissal or is the statutory language unconstitutionally "void for vagueness?"

2. Is the decision of the Illinois Supreme Court itself an unconstitutional limitation on appellant's right of free speech and is the decision also unconstitutionally vague?

3. Prescinding from the particular statute and decision, can appellant, or any public school teacher, be dismissed for writing and publishing statements critical of his Board of Education and administration when the statements are substantially correct?

4. Does the mere fact that plaintiff is an employee of government automatically restrict or curtail his right to free speech as guaranteed by the Constitution?

5. Does an employment dismissal hearing comply with the Due Process requirements of the Fourteenth Amendment to the Constitution of the United States in a case in which a teacher has written and published a letter criti-

cal of his Board of Education and administration when the Board of Education acts as prosecutor of the cause, and the Board of Education also acts as the trier of facts and the findings of the Board of Education are entitled to be considered *prima facie* correct under the state statute permitting judicial review?

STATEMENT OF THE CASE

In September, 1959, Marvin L. Pickering began his duties as a regularly certified public school teacher for the Board of Education of Township High School District 205, Will County, Illinois (App. I, 99). At that time and subsequently Pickering was also a resident of the district.

During the next five years the board of education submitted four tax proposals to the voters of the district. Two concerned bonds for the construction of new schools. Two concerned tax rate increases. The material dates are:

February 25, 1961: The board asked the voters to approve a bond issue to raise $4,875,000 to erect two new schools (App. II, 17-26). This proposal was defeated.

December 2, 1961: The board submitted to the voters another bond proposal, this time calling for the authorization of a bond issue to raise $5,500,000 to build two new schools (App. II, 26-37). The proposal was passed. The bonds were issued and the schools were built.

May 23, 1964: The board submitted a proposal calling for an increase in the tax rate. The voters defeated the proposal.

September 19, 1964: The board submitted a second proposal calling for an increase in the tax rate. This pro-

posal was also defeated. It was this second tax rate increase proposal that brought Marvin Pickering from obscurity.

In the weeks which preceded the election, the Lockport Township High School District 205 Teachers Organization published a series of columns in the local newspaper, the *Lockport Herald* (App. I, 61; II, 9-15). Some of these columns urged passage of the September 19th tax rate increase proposal. In its July 30, 1964, column the organization said:

> Some curtailment of essential curricular offerings has already occurred. Continued refusal to provide funds must eventually result in more drastic reductions in curriculum, equipment and services (App. II, 11).

On September 17th the organization column said:

> Voting No on Saturday, Sept. 19, will mean that our students—many, leaders of the future—will be offered substandard educational opportunities which could lead to substandard outlooks in adult life (App. II, 15).

In the same September 17th issue the superintendent of the district had a letter published which said:

> An increase is needed in our present tax rates . . . By supporting these necessary tax increases we can continue to provide quality education. A defeat means that education and students will suffer. . . . We hope you will find a few minutes to vote on this proposition on September 19.
>
> Your Board of Education and Administration (App. II, 37, 38).

The superintendent's letter was distributed in mimeographed form to the voters on September 18th. The next day the voters of the district rejected the proposed tax increase.

Marvin Pickering had just started his sixth year of teaching in the district when the September 19th tax increase was defeated. In his first five years he had apparently taught without incident. The record contains nothing about his teaching ability. Whether he was the object of reprimand or the subject of special praise is not disclosed. Although he had actively supported one of the 1961 building bond proposals, he drew no special attention until a letter he submitted to the editor of the *Lockport Herald* on September 22, 1964, appeared in the September 24th edition of the newspaper.

On October 8, 1964, the Board of Education adopted a resolution dismissing him because of his statements in the letter (App. II, 6-8).

Being a tenure teacher, Pickering demanded a hearing pursuant to *Ill. Rev. Stat.*, Chap. 122, Sec. 24-12. He also demanded a Bill of Particulars. The hearing was granted and the board supplied an Answer to the Bill of Particulars specifying the parts of the letter to which it objected.

The basic charges against Pickering were that statements in the letter were untrue and that because they were untrue the reputations of the board, administration and the schools were injured; the statements would disrupt the discipline of the teachers; and the statements would tend "to foment controversy, conflict and dissension" among board, administration, faculty and residents of the district.

The board in its Answer to Bill of Particulars asserted that Pickering's letter was untrue in sixteen particulars. Pickering's response to this charge of factual inaccuracy was and remains that his statements were essentially correct. Additionally, Pickering's attorney took the position at the hearing:

> That all this testimony today is basically irrelevant because I think the real issue here is whether he has a right to write the letter, without reference to the fact as to whether every statement in it was true or untrue (App. I, 84).

The hearing provided by *Ill. Rev. Stat.*, Ch. 122, Sec. 24-12 is conducted by the Board of Education which brings the charges for dismissal. Pickering's hearing was conducted before the seven (7) members of the Board of Education.

The hearing was chiefly concerned with the accuracy or inaccuracy of the statements. No evidence was received concerning the reputations of the board members, administration or schools. No evidence was received concerning disruption of teacher discipline.

At the close of the hearing the Board adopted a summary resolution which found that the charges of the initial resolution and the Bill of Particulars had been proved (App. I, 25). The board concluded that the statements were factually untrue and that this resulted in *per se* injury to the reputations of the schools and its officials and would be *per se* disruptive of teacher discipline.

Pursuant to the Administrative Review Act *(Ill. Rev. Stat.*, Ch. 110, Par. 264-279) Pickering sued for review of his dismissal in the Circuit Court of Will County, Illinois. His complaint asserted denial

> of his property and personal rights without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States * * * of his right to freedom of the press and of speech in violation of the First Amendment of the Constitution of the United States (App. I, 7).

The Circuit Court held that the

> standard in the statute that the board has power to dismiss any teacher 'whenever, in its opinion, the interests of the schools require it' is constitutionally sufficient. It is not a standard so vague and indefinite as to be a denial of due process (App. I, 35).

The Circuit Court also held that the "interests of the school" . . . "override Pickering's freedom of speech." The Circuit Court concluded by affirming the dismissal.

Pickering appealed to the Illinois Supreme Court which affirmed (App. I, 154).

Thereafter, Pickering petitioned for a rehearing which was denied (App. I, 155). Pickering then took his appeal to this court.

No detailed analysis of the truth of falsity or circumstances surrounding the statements in his letter are set out here. Plaintiff will in Part VI of his argument cover this aspect of the case.

SUMMARY OF PLAINTIFF'S ARGUMENT

Plaintiff, a public school teacher, was dismissed because he wrote a letter which criticized the way the Board of Education and superintendent were operating the schools in the defendant school district.

Plaintiff contends that he has the right to publicly criticize public officials and that he did not cede that right when he became a teacher. Plaintiff submits that the general statutory authority for dismissing teachers *(Ill. Rev. Stat.* Ch. 122, Sec. 10-22.4) in so far as it allows dismissal for "other sufficient cause" or "when, in the opinion of the board, the interests of the schools requires it" is totally vague and cannot, constitutionally, be relied upon as a valid limitation on plaintiff's right of free speech. The failure of the Board of Education to as-

sert that it had a rule or regulation limiting free speech left plaintiff without any guide by which to gauge what he could or could not say. Plaintiff submits that his speech might be subject to reprisal under two circumstances:

1. He actually disrupted a government function or posed a real threat to the operation of government.

2. His statements fell beyond the protection of the first amendment.

As to the first, plaintiff submits that there was no showing that he disrupted the schools and that the board cannot prove there was by its *per se* theory.

As to the second, plaintiff submits that his right to publicly express opinions about public officials remains protected until his statements are proved "knowingly false" or "recklessly false". The board having made no such finding failed to place plaintiff's statements outside the constitutional protection of *New York Times* v. *Sullivan*, 376 U.S. 254, 84 S. Ct. 710 (1964).

Plaintiff further contends that the Illinois statutory scheme which allows a board to frame charges against a teacher, move for his dismissal, hear evidence as judge, determine his punishment and then have their findings held *prima facie* true upon judicial review is a violation of plaintiff's due process rights. Plaintiff further contends that the Illinois Supreme Court's failure to make an independent review of the record in accord with the principles of *Jacobellis* v. *Ohio*, 378 U.S. 184, 84 S. Ct. 1676 (1964) was improper.

Finally plaintiff believes that the statements he made were substantially correct and that whatever rule is applied he should not be penalized for such statements.

ARGUMENT

I. PLAINTIFF WAS DISMISSED FROM HIS EMPLOYMENT AS A PUBLIC SCHOOL TEACHER BECAUSE HE EXERCISED HIS FIRST AMENDMENT RIGHT OF FREE SPEECH.

Marvin Pickering began his sixth year of teaching in the Lockport, Illinois High School system at a time when the school district was faced with financial problems. Attempts to pass a tax increase in May, 1964 had failed. The school board decided to try again in September. The District 205 Teachers Organization supported the proposal and published a series of columns in the local newspaper (App. II, 9-15). In its September 17th column the leaders of the organization said:

> ". . . A vote for the referendum will alleviate the immediate, drastic needs and allow present standards of education to continue.
>
> ". . . To those citizens who object to the referendum: Voting No on Saturday, Sept. 19, will mean that our students—many, leaders of the future—will be offered substandard educational opportunities which could lead to substandard outlooks in adult life" (App. II, 15).

The Superintendent of the district openly supported the tax increase, publishing a letter in the same edition of the paper distributing it to parents of the students the next day. His comments included:

> "The present .65 educational tax rate is inadequate to meet the teachers' salaries which alone total $1,297,746."
>
> "The present .02 cent transportation rate is inadequate—we borrow from the education fund to make ends meet."

> "By supporting these necessary tax increases we can continue to provide quality education. A defeat means that education and students will suffer" (App. II, 38).

Notwithstanding the concerted effort, the campaign failed. On September 19th the voters went to the polls and defeated the tax increase.

Hearing the results of the election, plaintiff decided to enter the debate. He composed a letter, submitted it to the editor of the *Lockport Herald* and on September 24th it appeared. Unlike the "District 205 Teachers" and the Superintendent's analysis, Marvin Pickering did not blame the voters—he blamed the school board.

Two weeks later to the day he was fired.

The reaction of the Board of Education to plaintiff's venture into the arena of public debate sharply contrasts with the basic concepts of free speech which this Court has enunciated:

> "The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the republic, is a fundamental principle of our constitutional system." *Stromberg* v. *California*, 283 U. S. 359, 369, 51 S. Ct. 532, 536 (1931).

The Founding Fathers established the first provision of the Bill of Rights as the guarantor of free expression. Mr. Justice Brandeis, in his concurring opinion in *Whitney* v. *California*, 274 U.S. 357, 377, 47 S. Ct. 641, 648 (1927) summarized the rationale underlying the First Amendment:

> "Those who won our independence believed that the final end of the State was to make men free to

develop their faculties; and that in its government the deliverative forces should prevail over the arbitrary. They believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government. They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate, that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law—the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed."

This Court has further enunciated the special position of First Amendment rights in relation to other parts of the Constitution.

"The test of legislation which collides with the Fourteenth Amendment because it also collides with the principles of the First, is much more definite than the test when only the Fourteenth is involved. Much of the vagueness of the due process clause disap-

> pears when the specific prohibitions of the First become its standard. The right of a State to regulate, for example, a public utility may well include, so far as the due process test is concerned, power to impose all of the restrictions which a legislature may have a "rational basis" for adopting. But freedom of speech and of press, of assembly, and of worship, may not be infringed on such slender grounds. They are susceptible of restriction only to prevent grave and immediate danger." *Board of Education* v. *Barnette*, 319 U.S. 624, 639, 63 S. Ct. 1178, 1186 (1943).

This limitation of government interference with First Amendment rights extends to acts of local school boards. As this Court also said in *Board of Education* v. *Barnette*, 319 U.S. 624, 637, 63 S. Ct. 1178, 1185 (1943):

> "The Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all its creatures—Boards of Education not excepted. These have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights . . . .
>
> "Such Boards are numerous and their territorial jurisdiction often small. But small and local authority may feel less sense of responsibility to the Constitution, and agencies of publicity may be less vigilant in calling it to account. The action of Congress in making flag observance voluntary and respecting the conscience of the objector in a matter so vital as raising the Army contrasts sharply with these local regulations [saluting the flag and saying the pledge of allegiance] in matters relatively trivial to the welfare of the nation. There are village tyrants as well as village Hampdens, but none who acts under color of law is beyond reach of the Constitution."

The instant Board of Education rejected the underlying rationale which supports free speech; it refused to recog-

nize the favored status of free speech; and, most significantly it apparently did not see itself as an arm of government which should foster rather than repress free speech.

Plaintiff lost his job as a teacher solely and exclusively because he entered the arena of public debate as had other teachers in the district and as had the superintendent. The board's dismissal resolution (App. II, 6-9) limits the grounds for its action to the fateful letter and to no other reason. Thus plaintiff was dismissed because he exercised his right of free speech.

II. PUBLIC EMPLOYEES ARE ENTITLED TO FULL FIRST AMENDMENT RIGHTS

Public employees enjoy full first amendment rights. Whether public employment itself is a right or a privilege, the enjoyment of it cannot be conditioned upon the renunciation of constitutional rights.

Like using the mails or attending a public school, public employment brings a person into contact with government and provides a possible occasion for limitation of constitutional rights. Such a limitation, however, must stand or fall on its own merits and cannot be justified on the theory that benefits received from government of and in themselves justify limitation of rights.

Thus a school pupil does not leave his first amendment rights in the cloak room when he attends school, *Board of Education* v. *Barnette,* 319 U.S. 624, 63 S. Ct. 1178 (1943), nor does the letter writer renounce his right to free speech when he deposits his letter in the mail box, *Lamont* v. *Postmaster General of the United States,* 381 U.S. 305, 85 S. Ct. 1493 (1965).

So also the public employee does not lose his right of free speech when he enters the public service. Never-

theless there still prevails in some quarters the belief that a public employee has no rights except those specifically granted him by his employer. The apparent source of this idea is *McAuliffe* v. *Mayor, Etc., of the City of New Bedford,* 155 Mass. 216, 29 N.E.2d 517 (1892) in which Mr. Justice Holmes said:

> "The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman. There are few employments for hire in which the servant does not agree to suspend his constitutional rights of free speech as well as of idleness by the implied terms of the contracts."

This Court has in a number of decisions rejected this theory. In *State ex. rel Anderson* v. *Brand,* 303 U.S. 95, 58 S. Ct. 443 (1938) this Court upheld a teacher who contended the Indiana legislature had impaired her contract by repealing the act which had given her tenure. The implicit assumption of that case was that the petitioner as a public employee had no greater or lesser rights than any other citizen. There certainly was no implication that her public employment operated to suspend her rights under Article I, Section 10 of the Constitution.

However, this court has more directly met the question of the limitation of the rights of public employees starting with *United Public Workers* v. *Mitchell,* 330 U.S. 75, 67 S. Ct. 556 (1947). In that case this Court upheld the Hatch Act but in so doing recognized that the act and implementing rules provided a measure of interference "with what otherwise would be the freedom of the civil servant under the First, Ninth and Tenth Amendments." (330 U.S. at 95, 67 S. Ct. at 567). This Court noted that the act:

> "leaves untouched full participation by employees in political decisions at the ballot box and forbids only the partisan activity of federal personnel deemed offensive to efficiency. With that limitation only, employees may make their contributions to public affairs or protect their own interests, as before the passage of the act." 330 U.S. at 99, 67 S. Ct. at 569.

United Public Workers v. *Mitchell* was decided on the basis that public employees do have constitutional rights but the Hatch Act was a reasonable limitation. This Court said at 330 U.S. at 102, 67 S. Ct. at 570:

> "We do not know whether the number of federal employees will expand or contract; whether the need for regulation of their political activities will increase or diminish. The use of the constitutional power is for Congress, not for the courts."

Subsequent decisions of this court have continued to hold that public employees do have constitutional rights. These decisions have taken account of changing circumstances. More significantly, decisions have held that regulation of first amendment rights should not be determined by what a legislature (or school board) deems "reasonable." Instead this Court has in cases arising under the First Amendment subjected the decision of government bodies to independent judicial review, *Jacobellis* v. *Ohio*, 378 U.S. 184, 84 S. Ct. 1676 (1964).

Commencing with *Gerende* v. *Board of Supervisors*, 341 U.S. 56, 71 S. Ct. 565 (1951), this Court has in a series of cases decided the extent of constitutional rights of public employees under the First Amendment. Implicit in each of these decisions is the recognition that public employees do have rights, and that their public employment does not in itself justify diminution of those rights. *Adler* v. *Board of Education*, 342 U.S. 405, 72 S. Ct.

380 (1952), *Wieman* v. *Updegraff*, 344 U.S. 183, 73 S.Ct. 215 (1952), *Cramp* v. *Board of Public Instruction*, 368 U.S. 278, 82 S.Ct. 275 (1961), *Baggett* v. *Bullitt*, 377 U.S. 360, 84 S. Ct. 1316 (1964), *Elfbrandt* v. *Russell*, 384 U.S. 11, 86 S. Ct. 1238 (1966), *Keyishian* v. *Board of Regents*, 385 U.S. 589, 87 S. Ct. 675 (1967) and *Whitehall* v. *Elkins*, —— U.S. ——, 88 S. Ct. 184 (1967).

From *United Public Workers* to the present the recognition that public employees in general, and teachers in particular, do not cede constitutional rights by going to work for government has become more openly acknowledged.

Mr. Justice Black in his *dissent* to *United Public Workers* v. *Mitchell* stated at 330 U.S. 111, 67 S. Ct. 575:

> "There is nothing about federal and state employees as a class which justifies depriving them or society of the benefits of their participation in public affairs. They, like other citizens, pay taxes and serve their country in peace and war. The taxes they pay and the wars in which they fight are determined by the elected spokesman of all the people. They come from the same homes, communities, schools, churches, and colleges as do the other citizens. I think the Constitution guarantees to them the same right that other groups of good citizens have to engage in activities which decide who their elected representatives shall be."

In *Adler* v. *Board of Education*, Mr. Justice Douglas in his *dissent* said at 342 U.S. 508, 72 S. Ct. 392:

> "I have not been able to accept the recent doctrine that a citizen who enters the public service can be forced to sacrifice his civil rights (citing *United Public Workers* and *Garner* v. *Board of Public Works*). I cannot for example find in our constitutional scheme the power of a state to place its em-

> ployees in the category of second-class citizens by denying them freedom of thought and expression. The Constitution guarantees freedom of thought and expression to everyone in our society. All are entitled to it; and none needs it more than the teachers."

In *Wieman* v. *Updegraff*, 344 U.S. 183, 73 S. Ct. 215 (1952) the demarcation between public employees and other citizens became almost obliterated. Mr. Justice Black now *concurring* said at 344 U.S. 193, 73 S. Ct. 220:

> "We must have freedom of speech for all or we will in the long run have it for none but the cringing and the craven. And I cannot too often repeat my belief that the right to speak on matters of public concern must be wholly free or eventually be wholly lost."

Any distinction between public employees and other citizens became obliterated from *Wieman* down to *Elfbrandt*. Thus, the dissenting view in *Adler* has now become the majority opinion. Any residual doubts were removed by this court in *Keyshian* v. *Board of Regents*, 385 U.S. 589, 87 S. Ct. 675 (1967). Adopting the language of the Court of Appeals decision, (345 F. 2d 236, 239), this court said at 385 U.S. 605, 87 S. Ct. 685:

> ". . . the theory that public employment which may be denied altogether may be subjected . . . to conditions regardless of how unreasonable has been uniformly rejected (citing cases) . . . It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege."

In *Garrity* v. *New Jersey*, 385 U.S. 493, 87 S. Ct. 616 (1967) this Court in even more explicit terms stated that entering public service does not cause a loss of constitutional rights.

"We conclude that policemen, like teachers and lawyers, are not relegated to a watered-down version of constitutional rights." 385 U.S. at 500, 87 S. Ct. at 620.

Public employees are entitled to have their acts and statements judged by constitutional standards. Plaintiff as a public employee has no greater or lesser rights than other citizens. He was and is entitled to have his public statements about the defeated tax increase and the operation of the public schools judged by the standards which apply to all citizens.

III. DEFENDANT BOARD OF EDUCATION HAS ASSERTED NO OVERRIDING INTEREST WHICH MIGHT JUSTIFY A LIMITATION OF PLAINTIFF'S FIRST AMENDMENT RIGHTS

In order to justify a limitation of first amendment rights the state must assert a paramount interest. This Court, in *Herndon* v. *Lowry,* 301 U.S. 242, 258, 57 S. Ct. 732, 739 (1937) expressed the basic principle that the:

> ". . . power of a state to abridge freedom of speech and assembly is the exception rather than the rule and the penalizing even of utterances of a defined character must find justification in a reasonable apprehension of danger to organized government."

The first amendment right of free speech may be forced to yield to the superior right of government to maintain its own existence, *Schenck* v. *United States,* 249 U.S. 47, 39 S. Ct. 247 (1918); *Dennis* v. *United States,* 341 U.S. 494, 71 S. Ct. 857 (1951) and to the right of government to carry on its normal functions, *Cox* v. *Louisiana,* 379 U.S. 559, 85 S. Ct. 476 (1965). These interests are quite different from those asserted by defendant in the case at bar.

Ill. Rev. Stat., Ch. 122 Sec. 10-22.4 provides the grounds or interests which justify dismissing teachers. The board passed over the statutory causes "incompetence," "cruelty," "negligence," "immorality" and "not qualified to teach." The board thus removed from consideration any challenge to plaintiff's ability to teach. The record is devoid of any evidence that plaintiff was a poor teacher or that his letter writing did or would in any way affect his teaching. The board thus chose not to assert the one interest which might really be paramount—his classroom performance.

Using the two remaining general grounds "other sufficient cause" and "whenever the interests of the school require it" the board by negative inference identified the interests it deemed worthy of greater protection than free speech:

1. The reputation of the board, administration and schools.
2. Discipline of teachers.
3. Morale and harmony among the teachers, board, administration and residents of the district.
4. Avoidance of controversy, conflict and dissension among the teachers, board, administration and residents of the district.

Considering first, the reputations of the school, the board and the administration, an important threshhold question presents itself—does a governmental body have a "reputation" capable of vindication. This Court in *New York Times* v. *Sullivan*, 376 U.S. 254, 84 S. Ct. 710 (1964) clearly answered the question in the negative. In so doing this Court noted the language of the Illinois Supreme Court in *City of Chicago* v. *Tribune Co.*, 307 Ill. 595, 601, 139 N.E. 86, 88 (1923):

> For good reason, no court of last resort in this country has ever held, or even suggested, that prosecutions for libel on government have any place in the American system of jurisprudence.

The Illinois Supreme Court in that case was confronted with a city suing a newspaper because of alleged injuries resulting from "untrue" and "malicious" statements made with intent to destroy the financial standing of the city. The newspaper demurred. The court thus faced with the basic question of criticism of government talked not in terms of libel and slander but in terms of free speech, giving that right the broadest possible meaning.

The "reputation" of a government body is not a legally cognizable interest in the first place, and certainly does not possess the quality of being "overriding and paramount." The second "damaged reputation," that of the Board of Education, has no greater standing than the school itself.

The interests which the board asserted in the reputation of the individual board members can be treated with the interest which the board asserted in the "professional reputation" of the school "administrators." It should be pointed out that the plural form of administrator is inappropriate for the only administrator involved is the district superintendent.

Initially a strike question arises as to whether a government body can itself be the guardian or protector of the reputation of its members and officials. Presumably these individual members and officials have a right to pursue remedies in civil actions to vindicate their reputations. Of course, they would be required to prove their cases in conformity with the principles laid down in *New York Times* v. *Sullivan*, 376 U.S. 254, 84 S. Ct. 710 (1964).

Assuming that a board has a right to vindicate the reputations of its members and officials, a second and even more serious question arises—can the board jettison the standards which would be mandatory in the individual members' separate civil actions.

These questions point in one direction—the concern of the school board in this case should be with making sure its schools run efficiently and making sure its personnel are qualified, not in vindicating its own or its members' and its superintendent's reputations. Assuming, however, that the board has an interest in the reputation of its members and superintendent, that interest is not of such a paramount or overriding concern as to justify the suppression of free speech. This Court has recently removed any doubt of how the balance is struck between the right of free speech and the public official's interest in his reputation.

In *New York Times Co.* v. *Sullivan,* 376 U.S. 254, 84 S. Ct. 710 (1964) this Court was confronted with a civil libel judgment which Alabama officials were attempting to enforce against the New York Times newspaper. The New York Times had published an advertisement in 1960 which was highly critical of Alabama law enforcement officers. The advertisement was in error in at least six particulars including absolutely false statements that officials padlocked college dining halls to starve students into submission.

This Court held that the interest of the public in having free and open debate is paramount. Using the language of *Sweeney* v. *Patterson,* 76 U.S. App. D.C. 23, 24, 128 F. 2d, 457, 458 (1942), which affirmed the dismissal of a Congressman's libel suit based upon a newspaper article charging him with anti-semitism in opposing a judicial appointment:

> Cases which impose liability for erroneous reports of the political conduct of officials reflect the obsolete doctrine that the governed must not criticize their governors . . . The interest of the public here outweighs the interest of appellant or any other individual. The protection of the public requires not merely discussion, but information. Political conduct and views which some respectable people approve, and others condemn, are constantly imputed to Congressmen. Errors of fact, particularly in regard to a man's mental state and processes, are inevitable . . . Whatever is added to the field of libel is taken from the field of free debate.

Thus in *New York Times* this Court directly met the central issue of the instant case and without dissent held that freedom of speech is paramount to the interest which a public official has in his reputation.

In *Garrison* v. *Louisiana*, 379 U.S. 64, 72, 85 S. Ct. 209, 214 (1964) this Court in a much shorter treatment of the issue in a criminal libel case concluded after reference to *New York Times*:

> "In any event, where the criticism is of public officials and their conduct of public business, the interest in private reputation is overborne by the larger public interest, secured by the Constitution, in dissemination of truth."

Having decided the crucial issue in favor of free speech generally, this court next turned to the question of what effect falsity has on free speech. In *New York Times* v. *Sullivan*, 376 U.S. at 279 this Court set out a rule which is capable of resolving the case at bar:

> The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the

> statement was made with "actual malice" . . . that is, with knowledge that it was false or with reckless disregard of whether it was false or not.

The necessity of a finding that the remarks were "knowingly false" or "recklessly false" was echoed in *Garrison*, 379 U.S. at 73, 85 S. Ct. at 215:

> "Moreover, even where the utterance is false, the great principles of the Constitution which secure freedom of expression in this area preclude attaching adverse consequences to any except the knowing or reckless falsehood. Debate on public issues will not be uninhibited if the speaker must run the risk that it will be proved in court that he spoke out of hatred; even if he did speak out of hatred, utterances honestly believed contribute to the free interchange of ideas and ascertainment of truth."

The constitutional protection afforded to persons criticizing public officials cannot be lost unless there is proof that the comments were not only false, but that they were also "knowingly" or "recklessly" false. Moreover, the burden of proof is on the public official and not on the critic.

The *Garrison* case provides a situation not unlike the instant case. Garrison, the District Attorney of Orleans Parish, Louisiana became involved in a dispute with the eight judges of the Criminal District Court of the parish. The District Attorney was not in the employ of the judges but they did control a Fines and Fees Fund which was used to defray expenses of the District Attorney's office. A dispute over this fund touched off a wider dispute between Garrison and the judges, resulting in a charge of criminal libel against Garrison for his criticism of the judges.

Although his employment brought him into regular contact with the judges and his obligations as an attorney

required him to be respectful to the court, this Court held that the public interest in free speech was superior to the reputation of the judges unless and until the criticism was "knowingly" or "recklessly false".

The Illinois Supreme Court, however, rejected the *New York Times* and *Garrison* standards asserting that they were libel cases and therefore not applicable to a dismissal situation.

Plaintiff submits that such a distinction is unreal and that the *New York Times* case has its vitality as a free speech case and demonstrates that the law of libel must accommodate itself to constitutional rights. It appears that this court agreed with plaintiff's position, because in *Bond* v. *Floyd,* 385 U.S. 116, 87 S. Ct. 339 (1966) this court held that the form of the restraint on speech—be it a libel action, being barred from public office or otherwise—is incidental to the essential question—the public interest in public debate including criticism of official positions. This court said in *Bond,* 385 U.S. at 136, 87 S. Ct. at 349:

> "We think the rationale of the *New York Times* case disposes of the claim that Bond's statements fell outside the range of constitutional protection. Just as erroneous statements must be protected to give freedom of expression the breathing space it needs to survive, so statements criticizing public policy and the implementation of it must be similarly protected. The State argues that the *New York Times* principle should not be extended to statements by a legislator because the policy of encouraging free debate about government operations only applies to the citizen-critic of his government. We find no support for this distinction in the *New York Times* case or in any other decision of this Court,"

In *Linn* v. *United Plant Guard Workers,* 383 U.S. 53, 86 S. Ct. 657 (1966) involved accusations and charges made in the course of labor dispute resulting in a libel suit. Seeing no special distinctions for the employer-employee field this court applied the *New York Times* rule:

> ". . . the most repulsive speech enjoys immunity provided it falls short of a deliberate or reckless untruth . . . We therefore limit the availability of state remedies for libel to those instances in which the complainant can show that the defamatory statements were circulated with malice and caused him damage."

The *Linn* case did not involve public officials so this Court adopted the *New York Times* standards "by analogy, rather than under constitutional compulsion . . . to effectuate the statutory design with respect to presumption . . ." 383 U.S. at 65, 86 S. Ct. at 664.

The *New York Times, Garrison, Bond* and *Linn* cases reveal that the underlying principle that a public official's interest in his reputation is generally inferior to the public interest in free speech is not dependent upon the law of libel but rather the law of libel and all other situations ripe for its application are dependent upon it.

Thus the Arizona Supreme Court relying on *New York Times* held that an applicant could not be denied admission to the bar simply because he had made highly critical statements about J. Edgar Hoover in *Nation* magazine, *Application of Levine,* 97 Ariz. 88, 397 P. 2d 205 (1965).

In *McFadden* v. *Detroit Bar Association,* 4 Mich. App. 554, 145 N.W. 2d 285 (1966), a Michigan Appellate Court upheld the refusal of a trial court to enjoin the distribution of a list of approved candidates which omitted the name of the petitioner, a candidate for judge. The court relying on *New York Times* reasoned that the interest

the candidate had in his own reputation was inferior to the right of free press.

Turner v. Kennedy, 332 F.2d 304 (8th Cir. 1964) involved the dismissal of an employee of the Federal Bureau of Investigation after he sent letters to a Senator and Congressman which were critical of the agency. The Civil Service Commission had found the employee "unsuitable for his position" and the employee had not challenged this finding. The Court of Appeals upheld the dismissal but Circuit Judge Fahy, noting that this unchallenged finding rendered his opinion "something of a paradox", nevertheless dissented because he did not approve of the proceeding below. Judge Fahy, noting that the letters fell within the sphere of the right of petition for relief of grievances, stated that the privilege which accompanied the sending of such a letter:

> "though not absolute, should be governed by the same standard as has been adopted by the Court in the Times case, namely, whether the statements were made with actual malice, that is, with knowledge that they were false or with reckless disregard of whether false or not." 332 F.2d at 307.

In *Swaaley* v. *United States*, 376 F.2d 857 (1967) the United States Court of Claims adopted Judge Fahy's dissent in upholding the right of a worker at a Navy shipyard to send a letter to the Secretary of the Navy.

The *Swaaley* decision explains in great detail that the worker's exercise of his right under the First Amendment to send a letter as a petition for redress of grievances must be judged by the standards of *New York Times*. The opinion leaves room for doubt, however, because it distinguishes the right of petition from the general right of free speech by apparently approving of the language

used in *Harrington* v. *United States,* 161 Ct. Cl. 432 (1962). That case involved the dismissal of a civilian Air Force employee for printing and circulating a pamphlet which alleged various kinds of waste and mismanagement.

The dismissal was upheld because the pamphlet was not a "temperate, documented, discussion of specific circumstances known to plaintiff which deserved airing." The pamphlet was also termed "unwarranted and defamatory" and the distribution of it violated the "obligation of loyalty each employee owes his employer."

Swaaley may stand for the proposition that government employees have the first amendment right of petition but not of free speech. This is an interesting concept in view of the Court of Claims reliance upon *New York Times* to support the right of petition. This is also peculiar in light of this Court's pronouncement that the first amendment rights of speech, press, assembly and petition are interwoven and interelated rights. They are in the language of this court "cognate" rights. *DeJonge* v. *Oregon,* 299 U.S. 353, 57, Ct. 255 (1937).

The court apparently takes the position that making public statements is a breach of the loyalty an employee owes his employer. Plaintiff suggests that this philosophy has been rejected by *Linn* v. *United Plant Guard Workers,* 383 U.S. 53, 65, 86 S. Ct. 657, 664 (1964) and by those cases which uphold the right of employees to publicly announce the facts of a labor dispute.

Furthermore, plaintiff submits that such a concept has no place in the public service for it would only subordinate the right of the public "to know" to the power of public officials to block information from reaching the public.

The only real effect of this so-called breach of loyalty is that citizens may know about government and the only

possible adverse effect is that some citizens may not think so highly of their government officials—but this effect on official reputations has been amply treated by *New York Times* and subsequent cases.

The benefits of such public statements is appropriately stated in *Application of Levine,* 97 Ariz. 88, 397 P.2d 205 (1965):

> Information known to government employees is not necessarily secret or confidential and unless its disclosure inimical to the security of the government, it should be debated uninhibitedly and robustly. 97 Ariz. at 97, 397 P.2d at 211.

Dr. Alexander Meiklejohn in his book *Free Speech and Its Relation to Self Government,* (1948), p. 88, put it as follows:

> "No one can deny that the winning of the truth is important for the purposes of self-government. But that is not our deepest need. Far more essential if men are to be their own rulers, is the demand that whatever truth may become available shall be placed at the disposal of all the citizens of the community. The First Amendment is not primarily, a device for the winning of new truth, though that is very important. It is a device for the sharing of whatever truth has been won. Its purpose is to give to every voting member of the body politic the fullest possible participation in the understanding of those problems with which the citizens of a self-governing society must deal. When a free man is voting, it is not enough that the truth is known by someone else, by some scholar or administrator or legislator. The voters must have it, all of them. The primary purpose of the First Amendment is, then, that all the citizens shall, so far as possible, understand the issues which bear upon our common life. That is why no idea, no opinion, no doubt, no belief, no counter-belief, no relevant information, may be kept from

> them. Under the compact upon which our constitution rests, it is agreed that men shall not be governed by others, that they shall govern themselves."

Or as Justice Schaefer said in his dissent below:

> "Teachers are not necessarily the best critics in matters of school finance and administration, but they are in closer contact with the actual operation of schools than anyone else and the public should not be deprived of their views."

Punishing those who criticize government works a disservice to the public interest because it inevitably chills the free inquiry and expression of opinions by the very individuals who are in the best position to contribute knowledgeable and constructive criticism—those on the "inside" of a government agency. To sanction such suppression of free speech cuts off a valuable source of information about the conduct of a most important public undertaking.

Even the court in *Swaaley* v. *The United States,* 376 F.2d 857 (1967) said the lower officials were not justified in acting as if the employee who wrote to the Secretary of the Navy:

> ". . . was practically delivering ammunition to the enemy. The Secretary was responsible for the successful operation of the Shipyard just as much as they were. He could be trusted not to misuse plaintiff's communication just as much as they could."

Plaintiff suggests that the residents of a local school district have a strong and legitimate interest in knowing what is going on in their schools and that a teacher is doing nothing wrong in telling them unless he speaks "knowing" or "reckless falsehoods."

Whether the interests here asserted by the board are characterized as the right to have their reputations free from blemish or to have employees who are "loyal" the interest of the public in open discussion subordinates those interests and requires that plaintiff and other teachers be free to speak unless they pass the limits set down in *New York Times* v. *Sullivan*, 276 U.S. 254, 84 S. Ct. 710 (1964).

Since it is now clear that the *New York Times* standard should be used as the measuring stick it becomes inescapable that plaintiff's letter, in so far as it attacks the reputation of the school and its officials is well within constitutional protection.

Indeed whatever dispute there may be as to whether the statements in his letter were true or false there is complete agreement that the statements are not knowingly or recklessly false for in its findings the board made no reference whatsoever to the statements as "knowingly false" nor as "recklessly false."

The Board of Education being bound by its own findings should be held to have infringed plaintiff's right of free speech.

The second general interest asserted by the board is that of good order and discipline among the teachers. Acknowledging the legitimacy of this interest plaintiff insists that there is not a scintilla of evidence that the publication of his letter *caused* or was followed by a period in which the teachers were unruly, did not perform their duties or that the teachers even reacted mildly.

Moreover, reliance upon "possible" or *per se* adverse effects conflict with constitutional requirements.

As this Court said in *Thomas* v. *Collins*, 323 U.S. 516, 530, 65 S. Ct. 315 (1945):

> "... any attempt to restrict those [First Amendment] liberties must be justified by clear public interest, threatened not doubtfully or remotely, but by clear and present danger."

Assuming that a reaction among the teachers was more than mere speculation it still is improper to blame plaintiff, for as this Court noted in *Ashton* v. *Kentucky,* 384 U.S. 195, 86 S. Ct. 1407 (1966) it is improper to attach responsibility to a speaker "because his neighbors have no self-control. . . ."

The question of disruption of government activities has been given considerable ventilation by courts in several jurisdictions and the general rule is that in order to sustain a dismissal, impairment must be actual, not speculative.

California has treated this question in a number of cases. In 1962 a California Appellate Court in *Board of Trustees* v. *Owens,* 206 Cal. App. 2d 147, 23 Cal. Rptr. 710 (1962) held that there was no evidence:

> "on the decisive issue . . . whether defendant's conduct had resulted in an impairment of the teaching process or had raised disciplinary problems . . ."

Owens like Pickering had published statements critical of the Board of Education that employed him.

In *Belshaw* v. *City of Berkeley,* 54 Cal. Rptr. 727 (Ct. App., 1966), a fireman who had written a letter similar to Pickering's gained reinstatement because the government agency failed to prove impairment of the administration of public service.

Kinnear v. *City and County of San Francisco,* 61 Cal. 2d 341, 38 Cal. Rptr. 631, 392 P.2d 391 (1964); *Fort* v. *Civil Service Commission,* 61 Cal. 2d 331, 38 Cal. Rptr. 625, 392 P.2d 385 (1964), *Bagley* v. *Washington Town-*

ship Hospital District, 65 Cal. 2d 499, 55 Cal. Rptr. 401, 421 P.2d 409 (1966), and *Rosenfield* v. *Malcolm,* 65 Cal. 2d 559, 55 Cal. Rptr. 505, 421 P.2d 697 (1967) each recognize that in limiting a constitutional right of an employee a restraint must "rationally relate to the enhancement of the public service." *Bagley* v. *Washington Township Hospital District,* 65 Cal. 2d 499, 55 Cal. Rptr. 401, 421 P.2d 409, 411 (1966).

The *Owens* court relied on *State* v. *Adams,* 69 So. 2d 309 (Fla. Sup. Ct., 1954), noting that the:

> flat prediction that the continued employment of defendant 'would undermine the educational program' . . . is necessarily speculative.

In *City of St. Petersburg* v. *Pfeiffer,* 52 So. 2d 796 (Fla. Sup. Ct., 1951) a fireman who purportedly accused his chief of "being incompetent and inefficient", was reinstated with the comment, "An employee may express himself freely so long as he does not impair the administration of the service in which he is engaged."

In *State* v. *Adams,* 69 So. 2d 309, 311 (Fla. Sup. Ct. 1954), the court came to grips with the objection that the appointment as principal of a person who had actively campaigned against the superintendent "would undermine and weaken the effectiveness of the superintendent." The court responded:

> This apprehension is necessarily speculative as it is based on the premise that the ill feeling generated in the campaign might result in the relator's being disloyal to the person whom she sought to defeat. If the relator proves insubordinate, inefficient or incompetent she may be dismissed regardless of the reason for her misdeed or her unfitness, but there is no logical reason now to determine that because of

> animosity growing out of the election the relator will inevitably be so recalcitrant that she be excluded from a position of authority.

In a later consideration of this same case, 74 So. 2d 65 (1954) the Florida Supreme Court held that

> it could *not* be logically inferred that because of the relator's political interest she would not work for the good of the schools in Duval County. (Emphasis added.)

The New York rule is stated in *Gersh* v. *Village of Tuckahoe,* 23 A.D. 2d 258, 260 N.Y. 2d 75 (1965):

> "Although removals on the ground of misconduct have been sustained because of improper criticism of public officials (*Matter of Sausbier* v. *Wheeler,* 276 N.Y. 246, 11 N.E. 2d 897; *Matter of Kern* v. *LaGuardia,* 264 App. Div. 627, 36 N.Y.S. 2d 346, affd. 289 N.Y. 776, 46 N.E. 2d 844), the actions of the parties removed under the circumstances of those cases established their unfitness to perform properly the duties of their office. At bar, the petitioner's conduct did not impair or affect the administration of the public service in which he was engaged. There is no rule which forbids public officers from commenting upon or expressing their opinion concerning matters which may be of public concern (*Matter of Dunning* v. *Turner,* 285 App. Div. 742, 140 N.Y.S. 2d 481, affd. 309 N.Y. 933, 132 N.E. 2d 311)."

Admittedly the status of the New York rule is questionable in view of *Puentes* v. *Board of Education* now pending in this court (No. 562).

In *Smith* v. *Board of Education,* 264 Ky. 150, 94 S.W. 2d 321 (1935) the Kentucky Court of Appeals held in favor of a superintendent who was dismissed after he filed charges against school board members with the State Board of Education. In this early case the court noted that a cause for dismissal:

> . . . must be a cause relating to and affecting the administration of the office and must be restricted to something of a substantial nature directly affecting the rights and interests of the public.

In *Appeal of Coates,* 47 Wash. 2d 51, 287 P.2d 102 (1955), the Washington Supreme Court ordered reinstatement of a principal who becoming engaged in a heated argument with some members of his board had used such statements as "communist," "black shirt," and "purge" in reference to the tactics of certain newly elected board members. The court distinguished classroom conduct from dealings with adults:

> Teachers are required to exercise a high degree of patience and self-control when dealing with their youthful charges; but in their relations with adults, including school board members, they should be judged by the ordinary standards of civility applicable to the particular relationship.

The Iowa Supreme Court has recently upheld firemen who violated the following rule:

> "No member of the Department shall give out any information relative to the Department, its operations, equipment and so forth unless permission by the chief has been granted." *Klein et. al.* v. *Civil Service Commission,* ..... Iowa ....., 152 N.W. 2d 195 (1967).

The firemen published statements regarding a labor dispute between their union and the department. The court upheld their right to publish and on the particular point of "disruption" the court concluded that although there is a legitimate interest in maintaining "order and discipline among the employees" there was "not the slightest proof plaintiff's conduct impaired the administration of the public service of which they were a part." 152 N.W. 2d 195, 200 (1967).

That the instant school board has a legitimate interest in avoiding disruption of its services is not denied. That any disruption resulted from plaintiff's letter is categorically denied. It is incumbent on the board to demonstrate that there really was disruption and that it was plaintiff's fault. Defendant has failed on both counts.

All of what has been said in regard to possible disruption of school activities applies with full force to the final two interests, "harmony" and "avoidance of controversy among the teachers, board administration and residents of the district." Interference with these two supposed interests not only was not proved but "harmony and avoidance of controversy" are legally insufficient reasons for limiting free speech. In fact "controversy" is one of the objects of free speech.

The board initially declared in the dismissal notice (App. I, 9) that plaintiff's statements:

> "Seriously involved and damaged the professional reputations of said Administrators and Board and the reputation of the schools of this District and are and will be highly disruptive to the discipline of the teachers and the morale and harmony among teachers, administrators, Board of Education and residents of this District, and which said statements and comments will tend to foment controversy, conflict and dissension among them and jeopardize the welfare of the schools of this District."

This Court in *Terminello* v. *Chicago*, 377 U.S. 1, 60 S. Ct. 894 (1948) stated:

> "Accordingly a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have

> profound unsettling effects as it presses for acceptance of an idea. This is why freedom of speech, though not absolute, *Chaplinsky* v. *New Hampshire, supra,* pp. 571-572, is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance or unrest." 377 U.S. at 4.

The language of the dismissal notice and that of this Court could with minor editing be interchanged. Plaintiff must deny that the allegation that his letter would "foment, controversy, conflict and dissension . . ." had any evidentiary basis, but if upheld by operation of a *per se* presumption of their existence they nevertheless are the very ends of free speech.

Reviewing the interests asserted by the board—the reputation of public officials—good order and discipline—harmony—lack of controversy—it becomes apparent the board has not established as to any interest that:

1. It is of such overriding concern as to justify limitation of plaintiff's right of free speech.
2. AND it was in any real danger of actually being adversely affected.

IV. PLAINTIFF WAS DISMISSED BY AUTHORITY OF A STATUTE WHICH IS UNCONSTITUTIONALLY VOID BECAUSE IT IS VAGUE

The Board of Education, in seeking authority to dismiss plaintiff, looked to Section 10-22.4 of Chapter 122 of the Illinois Revised Statutes which authorizes dismissal of teachers for:

> "incompetency, cruelty, negligence, immorality, or other sufficient cause and . . . when in its opinion, he is not qualified to teach, or whenever, in its opinion, the interests of the schools require it . . ."

In view of the intentional and overt limitations on First Amendment rights called for by the loyalty oath requirements of *Ill. Rev. Stat.*, Ch. 127, Sec. 166 (a) and (b), which prohibit advocacy of violent overthrow of the government, the absence of a parallel limitation of speech critical of public officials raises a reasonable inference that the dismissal statute can in no legitimate way restrict the free speech of public employees in criticizing public officials.

But, if indeed the dismissal statute contains the seeds of a legitimate limitation of teacher's rights to free speech, then the language of this Court in *Connally* v. *General Construction Co.*, 269 U.S. 385, 391, 46 S. Ct. 126, 127 (1926) becomes relevant:

> "In the light of our decisions, it appears upon a mere inspection that these general words and phrases are so vague and indefinite that any penalty prescribed for their violation constitutes a denial of due process. It is not the penalty itself that is invalid but the exaction of obedience to a rule or standard that is so vague and indefinite as to be really no rule or standard at all."

The *Connally* decision places upon government the duty to make determinations according to objective rules or standards. The reasoning is simple enough. In *Lanzetta* v. *New Jersey*, 306 U.S. 451, 453, 59 S. Ct. 618, 619 (1939) this Court said "All are entitled to be informed as to what the State commands or forbids." And in *United States* v. *Cardiff*, 334 U.S. 174, 176, 73 S. Ct. 189, 190 (1952) the Court added, "Words which are vague and fluid . . . may be as much of a trap for the innocent as the ancient laws of Caligula."

A.B. Small Co. v. *American Sugar Refinery Co.*, 267 U.S. 233, 45 S. Ct. 295 (1925) and *Jorden* v. *DeGeorge*, 341 U.S. 223, 71 S. Ct. 703 (1951) remove any thought

that the "void for vagueness" doctrine is applicable only in criminal cases. The *Small* case emphasized that it was "not the criminal penalty that was held invalid, but the execution of obedience to a rule or standard which was so vague and indefinite as really to be no rule or standard at all."

When the government limits *free speech*, it must proceed according to even more stringent standards. This was espoused by this Court in *Cramp* v. *Board of Public Instruction*, 368 U.S. 278, 287, 82 S. Ct. 275 (1961):

> "The vice of unconstitutional vagueness is further aggravated where, as here, the statute in question operates to inhibit the exercise of individual freedom affirmatively protected by the Constitution. As we said in *Smith* v. *California*, '. . . stricter standards of permissible statutory vagueness may be applied to a statute having a potentially inhibiting effect on speech; a man may the less be required to act at his peril here, because the free dissemination of ideas may be the loser.' 361 U.S. 147, at 151."

This Court reiterated this requirement of clear and precise language in *Ashton* v. *Kentucky*, 384 U.S. 195, 86 S. Ct. 1407 (1966):

> Vague laws in any area suffer a constitutional infirmity. When First Amendment rights are involved, we look even more closely lest, under the guise of regulating conduct that is reachable by the police power, freedom of speech or of the press suffer. We said in *Cantwell* v. *Connecticut*, . . . that such a law must be 'narrowly drawn to prevent the supposed evil' . . . and that a conviction for an utterance "based on a common law concept of the most general and undefined nature', . . . could not stand.

The language which this court in Ashton found void for vagueness was:

> "Criminal libel is defined as any writing calculated to create disturbances of the peace, corrupt the public morals, or lead to any act, which, when done, is indictable."

If this language is too vague to stand as a restriction on the right of free speech, it is patent that neither Section 10-22.4 of the Illinois School Code (*Ill. Rev. Stat.*, Ch. 122) nor any other standard employed by the Board of Education is language properly limiting free speech. In the absence of any statutory standard sufficient to limit free speech the most that defendant can demand is the application of the *New York Times* standard. But, as has been previously established, the use of the *New York Times* standard leaves plaintiff's letter to the *Lockport Herald* wholly within the protection of the First Amendment.

The instant school board has left each of its employees without any ascertainable guide line. It has thrust upon its employees the burden of guessing what can or cannot be said. The dismissal of plaintiff according to vague, illusory and non-existent standards has put other teachers in the district on notice that they may "avoid the risk of loss of employment, and perhaps, profession, only by restricting their conduct to that which is unquestionably safe. Free speech may not be so inhibited." *Baggett v. Bullitt*, 377 U.S. 360, 84 S. Ct. 360 (1964).

But plaintiff need not rely only upon a reading of the statute to reveal its vagueness. Judicial consideration of the statute removes all doubt. The trial court held (App. I, 35):

> ". . . the legislative standard in the statute [Chapter 122 Sec. 10-22.4] that the board has the power to dismiss any teacher 'whenever, in its opinion, the interests of the school require it' is constitutionally sufficient."

The precise language "whenever, in its opinion, the interests of the school require it" was under consideration in *Jepson* v. *Board of Education,* 19 Ill. App. 2d 204, 153 N.E. 2d 417 (1958) and the court said in direct reference to these words:

> "The question as to who shall determine what constitute cause has frequently been presented to the courts of this state and the rule to be deduced from the authorities is that *where the statute is silent, as in the instant case, as to what constitute cause,* the right to determine the question is in the tribunal having jurisdiction of the particular officer or employee." (Emphasis added.)

The court cited *Joyce* v. *Board of Education,* 325 Ill. App. 543, 60 N.E. 2d 431 (1945) and *Pearson* v. *Board of Education;* 12 Ill. App. 2d 44, 138 N.E. 2d 326 (1956).

It is perfectly clear then that this statute, being "silent," contains no ascertainable restriction on an employee's rights of free speech. But as has been previously established, restrictions on free speech must be affirmatively asserted; they cannot be left to definition after the fact. Plaintiff insists that the Section 10-22.4 is unconstitutionally vague, when considered as a limitation in free speech.

Assuming that the cited grant of power was intended to convey the authority to limit first amendment rights and that it is not an unconstitutional delegation to allow the school board to determine what standard will be used to limit these rights, then the Board's case "must collapse for the Superintendent in sweeping terms testified (App. I, 70):

> "There is no ruling, regulation, policy or otherwise of this school district, either promulgated by me or the School Board which requires school teachers to submit letters of this type for any approval before publication."

Indeed, the Board impaled itself on the horns of a dilemma. In its haste to assert that it did not limit teachers' rights, it swept away any colorable claim that it had a rule, regulation or policy that might allow restrictions of free speech.

Thus, after the fact, the Board determined that plaintiff must be dismissed, but in so doing the Board followed no guideline, let alone a standard which would meet the rigorous standards demanding clear and precise language which could withstand constitutional scrutiny.

Neither the foregoing statute or administrative-after the fact-ruling can comply with the standards set down by this court in *Wieman* v. *Updegraff*, 344 U.S. 183, 73 S. Ct. 215 (1952); *Cramp* v. *Board of Public Instruction*, 368 U.S. 278, 82 S. Ct. 275 (1961); *Baggett* v. *Bullitt*, 377 U.S. 360, 84 S. Ct. 1316 (1964); *Elfbrandt* v. *Russell*, 384 U.S. 11, 86 S. Ct. 1238 (1966); *Keyishian* v. *Board of Regents*, 385 U.S. 589, 87 S. Ct. 675 (1967), and *Whitehill* v. *Elkins*, U.S. 88 S. Ct. 184 (1967).

Plaintiff suggests that the decision of the Illinois Supreme Court itself provides no clear direction as to what a teacher can or cannot say.

The court first rejected the "New York Times rule" and instead of supplying any clear standard as a substitute asserted:

> "The issue here is not whether the board may be publicly subjected to false accusations but whether it must continue to employ one who publishes misleading statements which are reasonably believed to be detrimental to the schools" (App. I, 143).

Further elucidating its "standard" the court said:

> A teacher who displays disrespect toward the Board of Education, incites misunderstanding and distrust

> of its policies, and makes unsupported accusations against the officials is not promoting the best interests of his school, and the Board of Education does not abuse its discretion in dismissing him (App. I, 144).

While these two key excerpts may give some direction the only safe position any teacher may assume is to remain completely silent. The Illinois Supreme Court has apparently removed truth or falsity as a consideration. It apparently also removed scienter or good faith as a consideration. Black, *Law Dictionary* (4th Ed. 1951) p. 1151 defines "misleading" as follows:

> "Delusive; calculated to lead astray or to lead into error. *Diamond Drill Contracting Co.* v. *International Diamond Drill Contracting Co.*, 106 Wash. 72, 179 P. 20, 122. Instructions which are of such a nature as to be misunderstood by the jury, or to give them a wrong impression are said to be "misleading."

Considering the courts terminology as it applies to a teacher who is about to put pen to paper—Do the negative attributes of "misleading" attach to the writer and cause responsibilities only if there is an intention to mislead? Or do the negative attributes attach if the *words* that are used have the capacity to mislead even though there is no intention to mislead? Worse yet, if there is no intention to mislead and the words chosen would not ordinarily mislead but because of some readers' inability to read correctly they are misread, does responsibility attach?

The great difficulty facing a teacher can be seen in the one simple sentence which Marvin Pickering wrote and for which he was called to task. Pickering wrote:

> "letters by your Board and Administration have stated that teachers' salaries total $1,297,746 for one year." (App. I, 12)

Plaintiff made this statement because in the edition of the *Lockport Herald* which appeared on September 17, 1964 a letter which had been submitted by the Superintendent (App. 1, 87) contained the following language (App. II, 37):

> The present .65 educational tax rate is inadequate to meet the teachers' salaries which alone total $1,297,746 . . .
>
> Your Board of Education and Administration.

If Plaintiff's almost direct quotation of the letter of the superintendent falls within the category "misleading statements" then it is apparent that nothing any teacher could ever say would be safe from condemnation. Nevertheless the Board in its Bill of Particulars I, E (App. 1, 17) said:

> As to teachers' salaries stated in paragraph 3 of Mr. Pickering's letter we know of no letter written by either the Board or Administration that states teachers' salaries for the figure as indicated.

The real dispute here, even though the board incorrectly lodged its attack on the existence of the superintendent's letter was over what the word "teacher" meant. Pickering (thinking that the word "teachers" meant classroom teachers and did not include the administrators and other non-teaching staff) said in his letter that the superintendent's figure of $1,297,746 was too high and that it "must have been the total payroll." The record reveals that Pickering was right for the superintendent said the term teachers included "counsellors, principals and their assistants, their secretaries. . . . Also contingency." (App. I, 69).

As Justice Schaefer said in his dissent:

> "With respect to this matter the plaintiff was clearly more accurate than the board, and probably no less accurate than the superintendent." (App. I, 149)

Marvin Pickering could not have known that this statement would fall within the category "misleading." Nevertheless, a Board of Education has been allowed to make such a determination and the Illinois Supreme Court has said it will not interfere with it.

No further detailed analysis of the guidelines or lack thereof which the Illinois Supreme Court has supplied is necessary. The only safe course which teachers can take is to avoid saying anything.

It should be apparent that "other sufficient cause" or "best interests" are constitutionally void because they are vague. It should be even clearer that the complete absence of a school board rule restricting free speech has such insubstantial status that it can't even qualify as vague. The general concepts presented by the Illinois Supreme Court not only conflict with the constitutional rationale supporting free speech but they too are incapable of being understood. They are in the court's own language "misleading."

V. PLAINTIFF WAS DISMISSED UNDER A PROCEDURE WHICH VIOLATED HIS RIGHTS OF DUE PROCESS

Justice Schaefer in his dissent below characterized the procedure by which plaintiff was dismissed as "unseemly" if not "unconstitutional." (App. I, 147) That procedure is found in *Ill. Rev. Stat.*, Ch. 122, Sections 24-11 to 24-16. The key section, 24-12, is that which provides dismissal procedure for teachers who, like plaintiff, have entered upon contractual continued service or "tenure."

Without unduly analyzing the changes the tenure law made in teacher-board relations it can be said that in pre-tenure days a teacher would enter into a contract on a year to year basis, there being neither an automatic

renewal nor obligation to renew on either the board or the teacher. In the event of a breach of contract the matter was triable in court by a judge or jury according to ordinary contract principles.

The Tenure Act effected two fundamental changes for those who qualify by completing a two year probationary period. First, the contract becomes permanent until the teacher reaches 65 years of age. It may be terminated unilaterally by the teacher only during a brief period each summer and by the board only for cause as defined in Section 10-22.4, the provisions considered earlier in this brief. Second, if the board terminates for cause, (what would be a common law breach) the matter is not tried before a judge and jury but rather before the board itself.

The board formulates the charges, acts as prosecutor, then as judge, and finally determines the punishment. When the findings of the Board are taken for review the Administrative Review Act (*Ill. Rev. Stat.*, Ch. 110, Sec. 274) provides that no new evidence may be heard and:

> "The findings and conclusions of the administrative agency on questions of fact shall be held to be *prima facie* true and correct."

This has been interpreted to mean that the decision of the school board will not be set aside unless as the Illinois Supreme Court says "it is without substantial support in the record." or "the decision will not be set aside unless it is against the manifest weight of the evidence." (App. I, 144) Whatever differences there are between these two standards both show a deference to quasi-legislative decisions and neither is as stringent as the rule of review set down for federal agencies by this

Court in *Universal Camera Corp.* v. *N.L.R.B.*, 340 U.S. 474, 71 S. Ct. 456 (1951).

In capsule form "cause" is determined by the board, the sufficiency of the evidence is determined by the board, and its decision is subject only to a limited review. Justice Schaefer's criticism of this procedure is not alone.

In *Miller* v. *Board of Education*, 51 Ill. App. 2d 20, 200 N.E. 2d 838 (1964) an Illinois Appellate Court reversed a teacher dismissal because the plaintiff

> "was prevented from having a fair trial by the multiple capacities in which the School Board and its attorney were functioning." 51 Ill. App. 2d at 41.

The *Miller* Court quoted from a concurring opinion in another Illinois Appellate decision, *Eidenmiller* v. *Board of Education*, 28 Ill. App. 2d 90, 170 N.E. 2d 792 (1960) (Abst.) which interestingly drew support from the Illinois Supreme Court as appears in the following excerpt found at 51 Ill. App. 2d 20:

> "Our Supreme Court once said of a similar statute that, 'a statute which compels a litigant to submit his controversy to a tribunal of which his antagonist his judge and does not afford due process of law.'" *Commissioners of Drainage Dist.* v. *Smith*, 223 Ill. 417.

Other state courts have noted the peculiarity of this procedure and have either been critical or expressed special caution. In *Shackley* v. *Board of Education*, 51 Del. 537, 149 A. 2d 331 (Super. Ct. Del. 1959), rev. 52 Del. 237, 155 A. 2d 323 (Sup. Ct. Del., 1959), the lower court said of the merger of roles at 149 A. 2d 336:

> "The burden in this case is upon the Board of Education, and that burden is accentuated by the fact that the said Board is not only the complainant and

> the prosecutor, but the judge as well. In such situations, the substantial evidence rule is to be zealously guarded and protected."

The Delaware Supreme Court reversed on the merits but noted at 155 A. 2d 328:

> "There is no question but that a court under such circumstances will scrutinize carefully the act of such a body."

The lower Delaware Court quoted from *In re Larsen,* 17 N.J. Super. 564, 86 A. 2d 430, 436 (1952) in which Judge William J. Brennan Jr. now a member of this Court said:

> "Are we precluded when applying the substantial test from taking into account the implications of the merger of functions, merely because the Legislature has combined the functions in the Director? I think not. The measure of our duty is to set aside any administrative decision when we "cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, * * *". The substantiality of evidence must take into account whatever in the record fairly detracts from its weight."

Decisions of administrative boards of such character require a careful study and consideration of the whole record, with all its inferences and implications to make sure that there is substantial evidence or evidence on which "men may not reasonably differ" to support the Board's decision.

The Alabama Supreme Court in *State ex rel. Steele* v. *Board of Education of Fairfield,* 252 Ala. 254, 40 So. 2d 689, 695 (1949) said:

> "The anomaly in procedure which permits the board of education, an administrative body, to serve in the

> triple capacity of complainant, prosecutor, and judge makes it vitally necessary that in reviewing administrative decisions, courts zealously examine the record with the view to protecting the fundamental rights of the parties * * *."

Kentucky provides by statute for a *de novo* judicial review if there is a violation of principles of fair play (KRS 161.790 (6)). Referring to the propriety of such a statute in view of attacks that this was a violation of a constitutional requirement of separation of powers the Kentucky Court of Appeals held in *Osborne* v. *Bullitt County Board of Education*, 415 S.W. 2d 607 (1967):

> "We believe the principle of due process requires that certain actions of administrative bodies be fully and completely reviewed in de novo proceedings especially where due process has not been observed in the administrative proceeding."

It seems apparent in the case at bar that neither the Circuit Court of Will County nor the Illinois Supreme Court saw any special duty to carefully scrutinize the record even though there was a merging of functions which initially weighted the procedure against plaintiff. Nor did these courts recognize that this was not a case of a disinterested board which had the duty to hear evidence and remove a teacher, but rather that they were highly interested and were likely to be:

> "quick to take offense at statements which they feel impugn their motives, honesty and integrity. *Justice Schaefer's dissent*" (App. I, 152).

Nor did the courts below recognize the peculiar difficulties which plaintiff necessarily faced in preparing a case. Considering the fact that plaintiff was already dismissed, it could hardly be expected that many teach-

ers would come forward to provide support. Admittedly objections were not raised on this score, but such difficulties are inherent in a case of this sort while in cases in which a board has no special interest other than to gather facts and determine if a teacher is guilty of some deficiency in his teaching, fellow teachers will feel far less danger of reprisal.

Whether the board, in fact, was prejudiced, whether teachers, in fact, were afraid to come forward is irrelevant for the actual situation which this case presented demonstrated a need for scrutiny and a need for admonition to boards and reviewing courts that such cases require such careful scrutiny. Instead the Illinois Supreme Court expressed no great concern and made no cautionary statements. Plaintiff suggests that the Illinois Supreme Court by its refusal to provide judicial safeguards has made that section of *Ill. Rev. Stat.* Ch. 122, Section 24-12 (which controls dismissal procedures) and Chapter 110, Section 274 (which limits the scope of review) fertile grounds for the violation of teachers' rights of due process.

But of all reasons which should have prompted careful review, none is so compelling as that of the requirement of independent review because first amendment rights were central to the case.

As this Court said, *Jacobellis* v. *Ohio,* 378 U. S. 184, 84 S. Ct. 1676 (1964):

> "In other areas involving constitutional rights under the Due Process Clause, the Court has consistently recognized its duty to apply the applicable rules of law upon the basis of an independent review of the facts of each case. E.G., Watts v. Indiana, 338 U.S. 49, 51; Norris v. Alabama, 294 U.S. 597, 590. And this has been particularly true where rights have

been asserted under the First Amendment guarantees of free expression. Thus in Pennekamp v. Florida, 328 U.S. 331, 335, the Court stated:

> "The Constitution has imposed upon this Court final authority to determine the meaning and application of those words of that instrument which require interpretation to resolve judicial issues. With that responsibility, we are compelled to examine for ourselves the statements in issue and the circumstances under which they were made to see whether or not they . . . are of a character which the principles of the First Amendment, as adopted by the Due Process Clause of the Fourteenth Amendment, protect.'"

However, the Illinois Supreme Court took the view that it would reverse only if the decision is "without substantial support in the record" or is "against the manifest weight of the evidence," both of which standards fall below the *Universal Camera* test which is considerably below the requirements of *Jacobellis*.

Apparently the only protection available to plaintiff is an aroused electorate which would retaliate against the board at the next election for dismissing plaintiff if it were an unjust dismissal. This safeguard was referred to by the Illinois Supreme Court in *Donahoo* v. *Board of Education*, 413 Ill. 422, 109 N.E. 2d 787 (1953) when it said at 426:

> A board would not so readily dismiss when its reasons therefor will be submitted to the bar of public opinion.

The irony of this position comes through with special force when it is realized that plaintiff got fired because he attempted to inform "the bar of public opinion."

The whole concept of constitutional protection of free speech negates the coupling of retaliation with dis-

approval. Debate should be heated, but whether someone is allowed to speak at all should not depend upon approval by the electorate or the elected.

As this Court said in *West Virginia State Board of Education* v. *Barnette,* 319 U.S. 624, 63 S. Ct. 1178 (1943):

> "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections."

Plaintiff submits that the procedure by which he was dismissed is pecularly susceptible to abuse and requires the utmost supervision by reviewing courts. We agree with Justice Schaefer that:

> "The unseemliness, if not the unconstitutionality, of this procedure reinforces my doubt that the General Assembly intended that it should apply to the exercise of First Amendment rights" (App. I, 147).

But the majority concluded otherwise and provided no cautionary safeguards. As a result we agree with Justice Schaefer's conclusion:

> "A legislative system which, as in this case, casts them [board members] in the role of aggrieved victims who formulate, prosecute and punish charges based on their grievances is not, in my opinion, compatible with present standards of due process" (App. I, 152).

VI. PLAINTIFF'S STATEMENTS WERE SUBSTANTIALLY CORRECT

This section of the Argument will consider each of the statements which the board challenged as being false. The statement will be set out, the challenge and then a comment will be made.

PARAGRAPH 1:

"I enjoyed reading the back issues of your paper which you loaned to me. Perhaps others would enjoy reading them in order to see just how far the two new high schools have deviated from the original promises by the Board of Education. First, let me state that I am referring to the February through November, 1961 issues of your paper, so that it can be checked."

CHALLENGED BY BILL OF PARTICULARS 1A: (App. I, 17)

"The source of the majority of allegations contained in the letter is not the February through November 1961 issues of the Lockport Herald as indicated in paragraph 1 of Mr. Pickering's letter."

ALSO CHALLENGED BY BILL OF PARTICULARS 1B (App. I, 17)

"The first sentence of Mr. Pickering's letter states that others would enjoy reading the back issues of the Lockport Herald to see just how far the new high schools have deviated from the original promises of the Board of Education where, in fact, there has not been a substantial deviation."

COMMENT: As to the Source of plaintiff's information, plaintiff did not indicate that he was relying on the February through November 1961 issues of the paper but was referring to them so as to advise the reader which issues contained the "original promises."

Whether or not there had been deviations depends on whether plaintiff was referring to the first (February) or second (December) bond issue as the origin of the "original" promises. The architect testified that he did not draft his plans for the second bond issue until the latter half of 1961 (App. I, 102). However, plaintiff said that the "original promises" could be found in the February through November 1961 issues. If the architect is correct then plaintiff can only be referring to the "promises" as they related to the first (February) bond issue, otherwise he would not have directed the reader to a February issue of the paper for "original promises" that came into existence in the latter half of the year. It being established that plaintiff was referring to the February bond issue as the source of the "original plan" there can be no doubt that there were substantial changes —extensive testimony was made to this effect. Actually plaintiff's statement is no more than an opinion and is not a representation of fact.

PARAGRAPH 2:	"One statement in your paper declared that swimming pools, athletic fields, and auditoriums had been left out of the program."
CHALLENGED BY BILL OF PARTICULARS 1C (App. I, 17)	"In Paragraph 2 of Mr. Pickering's letter he states that athletic fields and auditoriums were originally left out of the program. This is not true."

COMMENT: Plaintiff did not make the affirmance but rather referred to a newspaper article which made the statement. The paper (App. II, 22), the February 21, 1961 edition of the Lockport Herald, carried a story saying:

> "Such items as swimming pools, athletic fields, auditoriums, etc., have been left out of this program in order to obtain as much classroom space as possible."

The school board apparently refused to recognize any reference to the February bond issue as the "original" referred to should be a basis for dismissal.

Plaintiff submits this very disagreement demonstrates the inconclusiveness of the Board's position.

PARAGRAPH 2: "In fact, Lockport West has a better athletic field than Lockport Central. It has a track that isn't quite regulation distance even though the board spent a few thousand dollars on it."

CHALLENGED BY BILL OF PARTICULARS 1D: (App. I, 17) "The athletic field at Lockport Central is regulation distance."

COMMENT: While there was some dispute as to what is regulation distance, there was general agreement that a running track should be 440 yards around (App. I, 92). Under oath the track coach at Lockport Central testified that the track is, in fact, only 407 yards distance (App. I, 92).

It would appear that plaintiff was correct.

PARAGRAPH 3: "Letters by your Board and Administration have stated that teachers' salaries total $1,297,746 for one year."

CHALLENGED BY BILL OF PARTICULARS 1E (App. I, 17)

"As to teachers' salaries stated in paragraph 3 of Mr. Pickering's letter we know of no letter written by either the Board or Administration that states teachers' salaries for the figure as indicated."

COMMENT: The superintendent specifically admitted writing the letter referred to (App. I, 78). He signed it "Your Board and Administration." The letter with the exact amount stated was published just one week prior to plaintiff's letter being published (App. I, 87). A second version of the letter was distributed to parents (App. I, 80; App. II, 37).

The letter was admitted in evidence (App. I, 80). The board did not withdraw this charge but presumably upheld its initial ignorance of the letter when it "found all charges to be proven." Thus plaintiff's dismissal was in part based on the Board's not knowing what the Superintendents had done.

PARAGRAPH 3:

"To illustrate further, do you know that the superintendent told the teachers, and I quote, 'Any teacher that opposes the referendum should be prepared for the consequences'?"

CHALLENGED BY BILL OF PARTICULARS 1-F (App. I, 17)

"The superintendent has never told the teachers the following: 'Any teachers that oppose the referendum should be prepared for the consequences'."

COMMENT: There is some conflict of testimony as to whether or not the superintendent said the words as

quoted. That the words or similar words were spoken by the superintendent is sufficiently clear from the testimony of Phillip Polley, a teacher in the District. He recalled the superintendent saying "You should be prepared to face the consequences", or "You should be willing to face the consequences" (App. I, 97). Lee Atwater, another teacher who said the superintendent didn't say the words, added (App. I, 94):

> "I don't recall exact words. However, it was clearly brought out that should this bond issue fail all would be affected by it. That is as much as I recall."

Considering the testimony of Phillip Polley and Lee Atwater, there are reasonable grounds for accepting plaintiff's version at least as to substance. Again the question is raised—Was the plaintiff so inaccurate and reckless as to make this challenge part of the dismissal charge? The superintendent (App. I, 70, 79) flatly denied making the statement. In view of the admittedly disputed testimony, there is every reason to believe that the plaintiff was much closer to the truth than either the superintendent or the Bill of Particulars.

This aspect of the case is similar to a conflict in testimony which arose in *Swaaley* v. *The United States,* 376 F.2d 857. Judge Nichols writing for the Court of Claims said:

> ". . . we do not share the idea that if two persons differ in their recollection of a conversation between them, one must be lying."

Additionally, in view of what had happened to plaintiff it should be expected that other teachers would be hesitant to express themselves in a way which would bring them into conflict with the superintendent.

CHALLENGED BY BILL OF PARTICULARS 1G (App. I, 17)	"As to paragraph 4 of Mr. Pickering's letter dealing with the letter entitled: "District 205 Teachers speak, 'It is not true that 98% of the school teachers are supposed to have agreed to this letter'."

COMMENT: Plaintiff's statement is absolutely and completely true, as verified by the teacher who handled the writing of the letter. (App. I, 64).

The article to which plaintiff referred carried an explanation at the beginning. (App. II, 13; I, 63)

> "It is written by members of a committee appointed by the executive board of the group which, last year, represented 98% of the teachers of the district."

Plaintiff, in his letter, simply and truthfully made clear what this statement meant. The group represented or had 98% membership, but only five or six wrote the article. The charge in the Bill of Particulars simply does not meet or attack the truthfulness or validity of plaintiff's statement. While the committee de-emphasized the smallness of its size and emphasized the largeness (98%) of the group it represented, plaintiff chose to do the opposite, a technique common in democratic societies and all the defendant's charge amounts to is an attempt to deny plaintiff the right to make truthful statements placing the emphasis where he deems it proper.

In any event, if there is a complaint to be made, it should properly be made by the group or persons affected. No objection was made by the teachers' spokesman, Mrs. Lund. In fact, she substantiated the truthfulness of plaintiff's statements.

PARAGRAPH 4:	"Did you know that those letters had to have the approval of the superintendent before they could be put in the paper?"
CHALLENGED BY BILL OF PARTICULARS 1H: (App. I, 18)	"Letters do not have to have the approval of the superintendent before they can be put in the paper."

COMMENT: It is apparent that the speedy dismissal of plaintiff is ample vindication of the statement. Actually, the charge is improperly placed for it attempts to reduce to a matter of fact the ultimate issue of the case.

It is true that the board in dismissing Plaintiff relied on no censorship statute nor on a rule of its own. But it is equally true that the teachers' handbook (App. I, 64, 65) raised a reasonable inference that censorship was intended.

The quoted material moves from the cordial declarative "Each teacher is invited . . ." and "He is also invited . . ." to the imperative ". . . check the material with the building principal before releasing it."

The import of the handbook comes clear when it says publishable material "should be submitted in triplicate to the publicity coordinator."

As a practical matter the committee did, in fact, "submit all these letters to the Superintendent". (App. I, 65)

There appears to be ample ground, particularly in view of plaintiff's dismissal, for finding that the board, without benefit of statute or formal rule, effectively maintained a gag rule.

PARAGRAPH 5:	"If the cafeteria is losing money, then the Board should not be packing free lunches for athletes on days of athletic contests."
CHALLENGED BY BILL OF PARTICULARS 1I: (App. I, 18)	"The cafeteria is not losing money because of packing free lunches for athletes on days of athletic contests."

COMMENT: Plaintiff did not draw a causal connection. The Superintendent indicated that athletes did in fact receive lunches for which they did not pay (App. I, 80) and the cafeteria, in fact, was losing money (App. I, 80). Interestingly, plaintiff did not draw a causal relation but as any normal person would, he implied "Why give free lunches if you're losing money?" The Superintendent explained that the money for the free lunches did not come out of the cafeteria fund but from the athletic fund so that the loss in the cafeteria was not actually caused by the free lunches. However, plaintiff had drawn no causal relation. In the normal course of debate, the next question which plaintiff would ask—"Why free lunches at all?"

PARAGRAPH 5:	"Whatever the case, the taxpayer's child should only have to pay about 30¢ for his lunch instead of 35¢ to pay for free lunches for the athletes."
CHALLENGED BY BILL OF PARTICULARS 1J: (App. I, 18)	"Lunch prices are not 35¢ rather than 30¢ because of packing of free lunches for athletes."

COMMENT: The Superintendent indicated that athletes did in fact receive lunches which they did not pay

for (App. I, 80). The cafeteria was in fact losing money (App. I, 80). The board presumably was in the best position to tell how many "free lunches" were provided, but no attempt was made to provide these figures nor to provide the amounts transferred from the althetic fund to pay for the lunches. The board thrust upon plaintiff the whole burden of proving complete accuracy. There is ample evidence upon which plaintiff could base a contention that lunches were costing more because of free lunches being provided athletes. In any event, the entire statement is essentially one of opinion and not fact. To say that this specification was properly includable in the Bill of Particulars or was a proper basis for dismissal of the plaintiff is unreasonable.

PARAGRAPH 6:	"But $20,000 in receipts doesn't pay for the $200,000 a year they have been spending on varsity sports while neglecting the wants of teachers."
CHALLENGED BY BILL OF PARTICULARS 1K: (App. I, 18)	"The school board is not spending $200,000.00 a year on varsity sports and is not neglecting the wants of teachers."

COMMENT: The next paragraph in the letter gave sufficient indication of the cost items to which the plaintiff referred. Some of the items were capital investments, some were not. The net effect of reading the two paragraphs together indicates that the author was not using strict accounting principles, but was attempting to show the general cost of athletics.

The auditor for the board admitted his inability to allocate costs accurately (App. I, 60). Plaintiff's tallies

reached more than $170,000 (App. I, 108-111) and he indicated an ability to produce more cost items. The plaintiff in testimony not seriously challenged listed numerous items which indicated that his was a more accurate picture of the cost of athletics than was that painted by the Board of Education, namely, $49,554.00 (App. I, 57).

As to the second part of the sentence, the statement that the wants of teachers are not neglected is a matter of opinion. The Superintendent affirmed that the "wants" of teachers were not satisfied (App. I, 82). This could and probably is and will remain an area of disagreement. But to assert as a matter of fact and use as a basis for dismissal any challenges to the position that the wants of teachers are not being neglected is arbitrary.

PARAGRAPH 7:	"You see we don't need an increase in the transportation tax unless the voters want to keep paying $50,000 or more a year to transport athletes home after practice and to away games, etc."
CHALLENGED BY BILL OF PARTICULARS 1L: (App. I, 18)	"As to paragraph 5 of Mr. Pickering's letter, the cost of transporting athletes home after practice and to away games and etc. is not $50,000.00.

COMMENT: Plaintiff's $50,000 figure is inflated. However, the board apparently gave no consideration to increased costs being includable in the "etc." and ignored that the Board was nearly $50,000 off in its transportation appropriation for 1963-64 (App. I, 58). The Board with professional accountants was as inaccurate as plaintiff.

PARAGRAPH 8:	"To sod football fields on borrowed money and then not be able to pay teachers' salaries is getting the cart before the horse."
CHALLENGED BY BILL OF PARTICULARS 1M, 1N (App. I, 18)	"As to paragraph 6 of Mr. Pickering's letter, football fields have not been sodded on borrowed money."
	"Teachers' salaries have always been paid."

COMMENT: The architect for the Board of Education testified (App. I, 103-104) that sodding of a football field was "done out of the bond issue" and that he presumed "that it is borrowed." Black's *Law Dictionary* (4th Ed. 1951) p. 224 calls a bond "A certificate or evidence of a debt." The board's construing of plaintiff's statement is unreasonable and strained. The challenge in the Bill of Particulars alters the meaning of the latter part of plaintiff's sentence. Plaintiff's statement did not state as a fact that teachers had not been paid but questioned the board's ability to pay. The testimony educed at the hearing amply supported plaintiff's doubts. The Board of Education had issued $500,000 of tax anticipation warrants for the fiscal year ended June 30, 1964 (App. I, 58). On the very night the Board voted to dismiss plaintiff it was also confronted with problems in meeting its payroll. (See App. Vol. II, 16—item 12)

That teachers salaries were affected can hardly be doubted. The "District 205 Teachers Speak" column of July 30, 1964 (App. II, 11) noted: "So far, one of the main economies has been the board's refusal to make any adjustments of the teachers' salary schedule."

The Superintendent, in the letter of which the Bill of Particulars denied knowledge, said in support of a tax

increase: "The 65 cent rate is insufficient to take care of this one budget item, teachers salaries." Considering the financial difficulty of the district, the plaintiff had good grounds to be apprehensive and to voice concern and criticism of policies which, as he saw them, had brought the district to this point.

PARAGRAPH 12:	"I must sign this letter as a citizen, taxpayer and voter, not as a teacher, since that freedom has been taken from the teachers by the administration."
CHALLENGED BY BILL OF PARTICULARS 2-O (App. I, 18)	"The freedom of a teacher to sign a letter as a teacher and have the same published has not been taken away from Mr. Pickering or any teacher of Township High School District No. 205 by this administration."

COMMENT: The very fact that defendant included the charge in its Bill of Particulars is sufficient proof of the point in issue. This statement is the ultimate issue in this case and as such is not properly placed. In any event, the teacher handbook, the practice of submitting manuscripts, and the firing of plaintiff indicate that plaintiff has good and sufficient grounds for stating this opinion.

PARAGRAPH 13:	"Since there seems to be a problem getting all the facts to the voter on the twice defeated bond issue, . . ."
CHALLENGED BY BILL OF PARTICULARS 2P (App. I, 18)	"The bond issue has not been twice defeated."

COMMENT: Plaintiff was in error. The school district conducted two bond issues in 1961, losing the first and passing the second. However, the district also held two elections to increase the education tax rates during 1964. Both were defeated. In view of the fact that the second election was conducted just five days before plaintiff's letter appeared in the newspaper and that the remainder of the paragraph clearly referred to events surrounding the election, it is apparent that this was a mere oversight which in no way caused any misunderstanding and certainly no damage.

That this is a true and accurate explanation is apparent for it is obvious that in preparing the Bill of Particulars, defendant's attorney saw no significance when they examined the letter for they made this their sixteenth point of challenge when it properly should have been their fourth item. The list of charges otherwise parallels plaintiff's letter.

Interestingly, the committee representing the 98% of the teachers made the same mistake in the July 30, 1964 Lockport Herald Article (App. II, 11) when its erroneously referred to a May "bond issue". But, of course, this committee was favorable to the Board and thus not subject to the same close scrutiny when the Superintendent approved the article before publication. The Board attorney also made the same error (App. I, 120).

If Marvin Pickering could be called to task for this harmless slip, the rest of the teachers in the district had better limit their comments to the weather—and they had better be careful what they say about it too.

Plaintiff submits that the foregoing review of the truth or falsity of his statements demonstrates that not only was plaintiff not guilty of making, knowing or reckless falsehoods but that he was substantially correct.

CONCLUSION

Plaintiff, like any other citizen had a right to criticize public officials without fear of reprisals such as being driven from his profession.

Plaintiff's dismissal should be reversed because:

1. The statements he made were entitled to constitutional protection because they were not, by the board's own findings, "knowngly" or "recklessly" false.

2. The grounds "other sufficient cause" and "interests of the schools" which authorized plaintiff's dismissal are an unconstitionally vague, limitation on free speech.

3. The procedure by which plaintiff was dismissed and his case was judicially reviewed violated his right of due process.

Plaintiff prays that the decision of the Illinois Supreme Court be reversed and judgment be entered in his favor.

Respectfully submitted,

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